SUPREME COURT OF THE UNITED STATES.

No. 169.

JAMES J. DULL AND JAMES GOWAN, PLAINTIFFS IN ERROR,

vs.

JOHN P. OFFERMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original	print
Praecipe for summons	2	1
Summons	3	1
Declaration	4	2
Plea	10	5
Jury empanneled and hearing cause	11	5
Verdict and motion for new trial	13	6
Motion overruled and judgment on verdict	13	7
Bill of exceptions	15	7
Appeal bond	41	20
Writ of error	43	21
Clerk's certificate	45	21

Pleas in the Circuit Court of the United States of America
1 for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said Circuit Court, on Saturday, the twentieth day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-first year.

WILLIAM H. BRADLEY, *Clerk.*

Assumpsit.

JOHN P. OFFERMAN
vs.
JAMES J. DULL AND JAMES GOWAN.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the thirty-first day of January, in the year of our Lord one thousand eight hundred and sixty-seven,
2 came John P. Offerman, by Messrs. Goodrich, Farwell, and Smith, his attorneys, and filed in the office of the clerk of the Circuit Court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe for a writ of summons against James J. Dull and James Gowan, defendants, which said præcipe is in the words and figures following, to wit:

United States Circuit Court, northern district of Illinois.

Assumpsit.

JOHN P. OFFERMAN
vs.
JAMES J. DULL and JAMES GOWAN. } Dam's $10,000.

The cl'k will please issue sum's to March term.

GOODRICH, FARWELL, and SMITH,
Jan'y 28th, 1867. *Att'ys for Pl'ff.*

Endorsed: Filed Jan'y 31, 1867. Wm. H. Bradley cl'k.

On the same day, to wit, the 31st day of January, A. D. 1867, a writ of summons issued out of said cl'k's office against said defendants in said-entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to
3 wit:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon James J. Dull and James Gowan, if they shall be found in your district, to be and appear be-

fore our judges of our Circuit Court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto John P. Offerman in a plea of trespass on the case, upon promises, to his damage, as he alleges, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this thirty-first day of January, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the 91st year.

WM. H. BRADLEY, *Clerk.*

[50-cts. U. S. rev. stamp, cancelled.]

[Seal of court.]

4 I have executed the within writ by reading the same to, and in the presence and hearing of, James J. Dull and James Gowan, therein named, on the 31st day of January, A. D. 1867.

J. R. JONES, *U. S. Marshal,*
By A. B. COTES, *Dep'y.*

Endorsed: Filed March, A. D. 1867. Wm. H. Bradley, cl'k.

On this day to wit, the fifth day of February, A. D. 1867, came said plaintiff, by his attorneys, and filed in said clerk's office his declaration in said-entitled cause, which said declaration is in the words and figures following, to wit:

Circuit Court of the United States for the seventh circuit and northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Of the March term, A. D. 1867.

John P. Offerman, plaintiff in this suit, who is a citizen of the State of Illinois, by Goodrich, Farwell, and Smith, his attorneys, complains of James J. Dull and James Gowan, defendants herein, who are citizens of the State of Pennsylvania, and who have been
5 summoned, etc., of a plea of trespass on the case upon promises.

For that whereas, the said defendants heretofore, to wit, on the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and sixty-seven, at the city of Chicago, in the northern disrrict of Illinois aforesaid, became indebted to the said plaintiff in the sum of five thousand dollars of lawful money of the United States of America, for the work and labor, care and diligence, of the said plaintiff, by the said plaintiff before that time, done, performed and bestowed, and about the business of the said defendants, and for the said defendants and at their special instance and request; and being so indebted to the said plaintiff the said defendants, in consideration

thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay into the said plaintiff the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested.

And whereas also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendants, done, performed and bestowed other his work and labor, care and diligence, in and about other the business of and for the said defendants, they the said defendants then and there undertook and faithfully promised the said plaintiff to pay him so much money as he therefore reasonably deserved to have of the said defendants; and when the said defendants should be thereunto afterward, requested; and the said plaintiff avers that the said work and labor, care and diligence last mentioned at the time of the doing, performing, and bestowing thereof, were reasonably worth the further sum of five thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid, whereof, the said defendants afterwards on the same day and year and at the place aforesaid had notice.

6

And whereas also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid were indebted to said plaintiff in the further sum of five thousand dollars of like lawful money aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendants and at the like request of said defendants; and for other money by the said plaintiff before that time paid, lent out and expended for the said defendants, and at the like request of said defendants; and for other money by the said defendants before that time had and received to and for the use of the said plaintiff; and also in the further sum of five thousand dollars ($5,000) for so much money before that time, and then due and payable from the said defendants to the said plaintiff for interest upon and forbearance of diverse larger sums of money before then due and owning from the said defendants to the said plaintiff and by the said plaintiff forborne to the said defendants for diverse long spaces of time before then elapsed, at the like special instance and request of the said defendants; and being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested.

7

And whereas also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiff, of and concerning diverse other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further sum

8 of five thousand dollars, ($5,000,) of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants (although often requested etc.) have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiff ten thousand dollars, and therefore the said plaintiff brings suit and etc.

GOODRICH, FARWELL & SMITH,
Atty's for Plaintiff.

9 *Copy of account on which this suit is brought.*

MESSRS. DULL & GOWAN,
To John P. Offerman, Dr.

1864.				
April 1st.	To three months services,	@ $166 67.....		$500 01
1865.				
Jan'y 1st.	" 9 " "	@ 250 00.....		2,250 00
1866.				
Jan'y 1st.	" 12 " "	@ 250 00.....		30 00
1867.				
Jan'y 1st.	" 12 " "	@ 250 00.....		3,000 00
" 8th.	" 7 days services	@ 9 61.....		67 27
				$8,817 28
1865.				
Dec. 28th.	To 75 days over-time from Mar. 19, '64, to Dec. 28th, '65.....	@ $9 61.....		$720 25
1867.				
Jan'y 8th.	To keeping their books from May 9, '64, to Jan'y 8th, 67, 2 years and 8 months @ 360 00 per year.....			960 00
				$10,498 03

GOODRICH, FARWELL & SMITH,
Pl'ffs Att'ys.

Endorsed: Filed Feb'y 5, 1867. Wm. H. Bradley, cl'k.

On this day, to wit, the 5th day of March, A. D. 1867, came said defendants, by their attorneys, and filed in said clerk's office their plea in said-entitled cause, which said plea is in the words and figures following, to wit:

10 U. S. Cir. Court, northern district of Illinois.

JAMES J. DULL & JAMES GOWAN
ads.
JOHN P. OFFERMAN.

And the said defendant, by McAllister, Jewett & Jackson, their attorneys, come and defend the wrong and injury, when, &c., and say that they did not undertake or promise in manner & form as the said plaintiff hath above thereof complained against them, and of this they put themselves upon the country.

McALLISTER, JEWETT & JACKSON,
Def's Att'ys.

And the said plaintiff doth the like.

GOODRICH, FARWELL & RMITH,
Att'ys for Pl'ff.

Endorsed: Filed March 5, 1857. Wm. H. Bradley, cl'k.

On this day, to wit, the 13th day of April, in the March adjourned term, A. D. 1867, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Assumpsit.

11 JOHN P. OFFERMAN
vs.
JAMES J. DULL AND JAMES GOWAN.

Now come the parties, by their attorneys, and upon issue joined thereupon, come a jury of good and lawful men, to wit; William M. Riggin, Alfred Weston, Albert Ewing, W. P. Hewett, Luther Burley, J. P. True, Reuben Tower, W. Parks, Walter Sherman, John Gray, F. Gunnel and William S. Barnes, who were all duly elected, tried and sworn, well and truly to try said issue; and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

On this day, to wit, the 15th day of April, in the March adjourned term, A. D. 1867, of said court, in the record of the proceedings thereof in said-entitled cause, is the following entry, to wit:

Assumpsit.

JOHN P. OFFERMAN
vs.
JAMES J. DULL AND JAMES GOWAN.

Now come again the parties, by their attorneys, and now come also the jury in this behalf, empannelled and sworn, and by agree-
12 ment the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 6th day of April, in the March adjourned term, A. D. 1867, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Assumpsit.

JOHN P. OFFERMAN
vs.
JAMES J. DULL AND JAMES GOWAN.

Now come again the parties, by their attorneys, and now come also the jury in this behalf, empannelled and sworn, and after hearing the concluding evidence and the arguments of counsel, and receiving the instructions of the court, the jury retire to consider of their verdict; and by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same and deliver it to the clerk and disperse.

On this day, to wit, the 17th day of April, in the March adjourned term, A. D. 1867, of said court, in the proceedings thereof in said entitled cause, is the following entry, to wit:

12½ UNITED STATES OF AMERICA, *ss:*

To JOHN P. OFFERMAN, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the seventh circuit of the northern district of Illinois, wherein James J. Dull and James Gowen are plaintiffs in error and you are defendant in error, to shew cause, if any there be, why judgment in the said writ of error mentioned should not be corrected, and speedy justice done the the parties in that behalf.

Witness the Honorable Thomas Drummond, judge of the Circuit Court of the United States for seventh circuit and northern district of Illinois, this 23d day of November, A. D. 1867.

THOMAS DRUMMOND.

We hereby acknowledge personal service of the within citation on us this 23rd day of November, A. D. 1867.

GOODRICH, FARWELL & SMITH,
Att'ys for Offerman.

Endorsed: Citation. Jno. P. Offerman *v.* Dull & Gowan. U. S. Circ. Ct. north'n dist. Ill's.

31 *Assumpsit.*

JOHN P. OFFERMAN
vs.
JAMES DULL and JAMES GOWEN.

The jury in this behalf empanneled this day, returned into court their sealed verdict, wherein they say: We, the jury, find the issue

for the plaintiff, and assess his damages to the sum of two thousand seven hundred and fifty dollars and thereupon the defendants by their attorney, move the court for a new trial herein.

On this day, to wit, the 20th day of April, in the March adjourned term, A. D. 1867, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Assumpsit.

JOHN P. OFFERMAN,
vs.
JAMES J. DULL and JAMES GOWEN.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendants heretofore entered herein by their attorney for a new trial of this cause, and after hearing the arguments of counsel, the court overrules the motion.

It is thereupon considered and adjudged by the court that
14 the said plaintiff do have and recover of the said defendants the said sum of two thousand seven hundred and fifty dollars, his damages to us aforesaid assessed, together with his costs and charges by him about his suit in this behalf expended, amounting to the sum of forty dollars and seventeen cents, and that he have execution therefor.

15 On the hearing of said cause, the following exceptions were taken and allowed by the court and made of record herein, and are in the words and figures following, to wit:

United States Circuit Court, northern district of Illinois, March term, 1867.

Bi of exceptions.—Assumpsit.

JOHN P. OFFERMAN
vs.
JAMES J. DULL and JAMES GOWEN.

Be it remembered, that upon the trial of the aforesaid issue joined between the said parties, the counsel for the said plaintiff, to maintain and prove the said issue on his part, called the following witnesses, who, being duly sworn, respectively testified as follows, that is to say:

16 Jno. P. Offerman: I am the plaintiff in this suit. First saw the defendant, Gowen, at the Sherman House, in Chicago. in September, 1863. He and his partner, Jas. J. Dull, were bidders for the work of constructing the Lake Tunnel. The work had not then been let to them. I had two interviews with Mr. Gowen on the subject of being employed by them as general superintendent in case they should get the work. I afterwards went to Kansas, but left

word for Mr. Gowen where I could be found, as he desired me so to do. Subsequently received from Mr. Gowen the following letters:

CHICAGO, *Nov.* 21, 1863.

Mr. JNO. P. OFFERMAN.

DR. SIR: We are here getting ready to start the Lake Tunnel. We should like to have you here. We would give you a good situation for the next two years or more. Please let us hear from you immediately, as we wish to get the machinery up, so as to get to work in thirty or forty days from this date.

Yours, &c.,

DULL & GOWEN.

I answered the letter, but can't tell what the answer was. After that I received the following letter:

CHICAGO, *Dec.* 1, 1863.

Mr. JOHN P. OFFERMAN.

D'R SIR: Yours of the twenty-fifth ult. has come to hand; 17 and in answer would say, what pay would you want to come and take hold as a general superintendent? We would wish to commence soon. Please answer at once.

Yours, &c.

DULL & GOWEN.

I sent them an answer, of which the following is a copy:

WYANDOTTE, *Dec.* 8, 1863.

Messrs DULL & GOWEN.

GENTLEMEN: Yours of the 1st instant is at hand, and in reply I would come and take the general superintendence of the work at three thousand dollars per year.

Yours respectfully,

JNO. P. OFFERMAN.

I then received this telegram from them:

CHICAGO, *Dec.* 11, 1863.

Answer my letter by telegraph.

DULL & GOWAN.

I did not answer this, because I had already written them by mail. I then received from them another telegram, as follows:

CHICAGO, ILL., *Dec.* 12, 1863.

Mr. JOHN P. OFFERMAN:

Say at the rate of two thousand for the first three months, and if you are worth more we will give it. Come on at once. Answer.

DULL & GOWEN.

18 On receipt of that I answered that I would come, but requested them to send me one hundred dollars. I then received this telegram:

CHICAGO, *Dec.* 14, 1863.

Sent the money by express; do not delay.

DULL & GOWEN.

I received the hundred dollars and started; arrived in Chicago about the first of January, 1864; met Mr. Gowen and went right along to work without making any new arrangement. A house had been built on the ground near the proposed shaft, but we had to change its position, and raised the tower of the building as it was too low; an engine had been ordered for hoisting; I had to see to it; the engine was put up; then the large iron cylinders arrived for the shaft; some 3 or 4 weeks in getting them up to the works; ground was broken on the 17th of March; there were 16 feet of sand to go through, and had great difficulty in sinking the shaft, as we had to contend with the water and sand to get the cylinders down to the clay; we got through the sand in 4 weeks, and had the shaft bricked up and finished on the 21st of May. Then drifted westward from [from] the bottom of the shaft about 50 feet to give the engineers a sight on the tunnel eastward. I think that was finished in June. Then began to drift eastwards the lake; ventilation was produced by fire, by having the air pipe connected with the smoke stack of
19 the engine boiler; this was done for 2,700 feet, and then the air grew worse and the men complained much; I then proposed to use a fan, but Mr. Gowen said it would not do us any good.

Shortly after this I was called to Pennsylvania, and when, in Philadelphia, I found a fan such as I wanted, and wrote to Mr. Jas. J. Dull at Harrisburg, to come, as I wanted to see him relating to a fan. He came and concluded that I should purchase the fan, and it has been the means of completing the tunnel, and if we had not procured the fan or something producing the like effect, it would have been necessary to sink two more cribs in order to obtain ventilation to enable us to complete the tunnel.

I had the whole duties of the work to do in the progress of the work; I had to keep the accounts and the time of the men; Mr. Gowen did not give any orders except to me; if he did I paid no attention to them; he had no invention or plans except what he got from other persons; it was all thrown on me; I took charge of the books in May, 1864. A young man who kept the books up to that time was discharged; I at first objected, but Mr. Dull informed me if I would keep the books he would give my son Mr. Blundels place, at his pay, $2,500 per year, and I consented to keep them, the latter part of June or July, 1864, Mr. Gowen asked me to enter my account on the books.

(The books which were kept by double entry were here exhibited, and the following entries were read from the journal:)

20 JULY 9, 1864.

Tunnel		$1,250 00
To John P. Offerman:		
For 3 months services from Jan'y 1, '64 to April 1, @ $166 67	$500 00	
For 3 months fr. Ap'l 1 to July 1, @ $250	750 00	

SEPT. 10.

Tunnel		$500 00
To Jno. P. Offerman:		
For 2 months services from July 1 to Sept. 1, 1864	500 00	

DEC. 31.

Tunnel		$1,000 00
To Jno. P. Offerman:		
For 4 months services from July, 1864, to Jan'y, '65, @ $250	1,000 00	

JULY 22, 1865.

Tunnel		250 00
To Jno. P. Offerman:		
For 1 months services from Jan'y 1, '65, to Feb'y 1, '65	250 00	

JAN'Y 1, 1866.

Tunnel		1,833 37
To John P. Offerman:		
For 11 months services from Feb'y 1, '65 to Jan'y 1, 1866, @ $166 67	1,833 37	

(These are all the credits made to the plaintiff on the journal.)

21 Witness resumes: The reason that I made the last entry to my credit on the journal, at the rate of $166 67 a month, was that I had about that time a conversation with Mr. Gowen for some more money. He replied that they were loosing money on the job; he said he could not afford to give me any more than I had already received unless he got more from the city; I then made the entry, but afterwards thought I would look into it and see whether they

were loosing or making money; I did examine and ascertained that they were making money up to that time, and had made $40,000. I posted myself in the matter up to the time I left, Jan'y 1, 1867, the completion of the job. They had made $65,000 on the work, according to the books. The books contained all accounts of all their expenditures, including moneys paid for board of Dull and Gowen and travelling and other incidental expenses. After I ascertained how the matters stood I made no more entries to my credit; I quit work for Dull and Gowen Jan'y 8th, 1867; the tunnel was then nearly completed, four days would finish up the tunnel proper.

Cross-examined.

I had been in Chicago 2 or 3 months when I first saw Mr. Gowen, which was in Sept., 1863; I had been out of business for about 2 years; prior to thas I had been engaged in mining coal in Luzerne Co., Penna., where I had leased a property and put up large improvements, sunk a shaft 100 feet deep, put up a large breaker,
22 and built an incline plane of 1,700 ft. long, and put up three engines, 2 sixty horse and one of 40 horse power, and sold 1,000,000 tons of coal to the Delaware & Hudson Canal Company, and was mining from 3 to 500 tons of coal per day. Prior to this I was engaged in a large machine shop of 400 hands; kept the time and books of the business, and collected and paid all the hands; was here nine years; and prior to this I was engaged in mining coal in Schuylkill co., Penna.; I am about 50 years old. When I went to Kansas in the fall of 1863 I took out 80 men with me to work on the eastern divisions of the Pacific Railroad; was paid $60 a month and board. I had no conversation with Dull and Gowen in regard to my wages after I came to Chicago, until about the 1 Jan'y, 1866, which I have already stated; I kept the account of all the expenditures; had nothing to do with the cash; don't know how much Dull and Gowen received from the city; Mr. Gowen kept the bank account and received all the money; I know the contract price and how much work they performed. I made out pay rolls for the men monthly; the name of each man, the number of days' work, the rate per day, and the amount to be paid to each man for the month's work were entered in the time book.

These pay rolls are balances of amount due monthly; my own name was entered on these by myself every month at the rate of $166 67 a month; I was paid this sum by Mr. Gowen monthly with the others; I was paid at this rate monthly up to the time
23 I left.

A large number of pay-rolls were exhibited to the witness, and identified by him as being in his handwriting, all being substantially in the following form:

Pay-roll for the month, Nov., 1865.

Names.	Days.	Am't.	Off.	On.	Board.	Am't due.
Jno. P. Offerman	26	$166 67				$166 67
Chs. B. Casey	26	75 00				75 00
J. B. Brodine	26	75 00				75 00
Jno. Bennet	26	58 50	$30			28 50
Pat. McHugh	26	58 50	20			38 50
Jas. Brown	26	58 50	20		16 50	22 00
Jno. Forbes	26	58 50	30		16 50	22 20

Witness resumes: These pay-rolls were made out by me every month from the time-book, for Mr. Gowen's convenience, to enable him to see the balances due and to draw his check for the payment of the men.

The time-book contains every name, and each day's work was entered upon it opposite the name. At the end of the month the whole number of days' work was entered in the appropriate column. The next column to that showed the rate of wages per day, and the next to that the total amount due. There was next a column for receipts, where the men signed their names when the men received their pay; my own name was entered upon this time-book every month. I did not sign my name in the column for
24 receipts, as the other employees did. The book shows that I signed no receipts from the beginning, and the amount I received was charged on the journal on account of services rendered. Mr. Gowen spent nearly all his time in Chicago during the progress of the work. He was then on the ground two or three times a week, and sometimes oftener; he made all the contracts for materials; but I had to design and make plans for all the machinery we used; and when we got short of material, I had to send for them and see that they were delivered as fast as required.

(The book of accounts being shown to the witness, he testified that his entries in the journal commenced May 9, 1864, when he took charge of the books, on the 23d page of the book, and his last entry was Jan'y 5, '66, on page 173. In all there were 151 pages. The journal was posted every month.)

In reply to the interrogatory proposed by the court, the witness stated that he did not speak to Mr. Gowen about the amount of his wages at the expiration of the first three months, and come to a distinct understanding about it, for the reason that he was so busy he had not time to attend to it; that he felt a great deal more interest in the success of the work than about his own pay; by many persons the work was considered a folly, and that it would not succeed.

25 *William McHugh.*

I was employed about the tunnel from 15 to 18 months, commencing April 9, 1864. Mr. Offerman had charge of the work. Sometimes Mr. Gowan gave orders; but he was not there a great deal.

The men went to Offerman for instructions. He gave all his time to the work.

Timothy Brennan.

I was employed about the tunnel as a carpenter. Commenced work July 9, 1866, and worked till January 27, 1867. I supposed Offerman was superintendant. He gave the directions to the men. I got my directions from him; he told me how to build the cars; he was there during the regular hours in the day time. Don't remember seeing him there but once after regular hours.

Martin McHugh.

Was employed on the tunnel as a laborer about 9 months, commencing May 1, 1866. No one gave me any orders but Offerman.

Patrick McHugh.

Was a laborer on the tunnel from April 6, 1864, to January 7, 1867. Offerman gave the directions to the men; no one else gave any. Have seen Offerman there several times after regular hours.

26 *Cross-exam'n.*

He would occasionally come back in the evening, after supper. Can't say how many times I saw him there after supper. He was dressed up at those times. He boaded only 2 or 3 blocks off.

Richard Savage.

Am a machinist and manufacturer; have been engaged in the business about 11 years. I employ from 10 to 25 men. I furnished cars, a steam engine, gearing, &c., for the tunnel. I received all my instructions and the plans from Mr. Offerman. When I was constructing the engine for the crib, Mr. Offerman was away at the east. I applied for some directions, but no one was willing to take the responsibility of giving them until he got back. I was at the shore end of the tunnel frequently. Offerman was there, and taking general charge, as I supposed. I should say from what I know of Mr. Offerman's services, that if he was general superintendent of the work, and was attentive and faithful, that from three to four thousand dollars a year would be cheap enough for his services.

Cross-examination.

I employ a foreman in my shop; he is a skillful machinist. I am paying him now $2 50 a day. Have never paid over $5 a day.

27 *Mansel Talcott.*

Am engaged in quarrying stone; have been in the business 14 years. We employ from 100 to 125 men; we employ a superintendent and a bookkeeper. Am an alderman of the city; have been for the last 4 years. Have visited the tunnel 15 or 20 times, and

occasionally seen Mr. Offerman there. He was superintendent, as I understood. When Dull & Gowen applied to the common council for an advance on the contract price, Mr. Dull came to see me, and reffered to Mr. Offerman, as their superintendent, who could give me information about the cost of the work. I never heard them find any fault with him. I was not at the tunnel often enough or long enough to know much about the manner in which Offerman performed his duties. If he was superintendent of the work, and was competent and faithful, I think his services ought to be worth from three to four thousand dollars a year; and if he kept the books and pay-rolls in addition, I think he ought to have $5,000 a year. That is less than we pay our employees for the same service.

Re-examination.

Our superintendent works at the quarry, and has charge of the men. He gives the dimensions and measurements of the stone, and is responsible for its being properly cut. Our bookkeeper is
28 at our office in the city, and keeps all the accounts for stone sold and delivered, as well as for the expenditures in the business.

Augustus F. Buschick.

Am a practical machinist; have been in the business 24 years; have done a great deal of work for Dull & Gowen. I was at the tunnel 40 or 50 times. Mr. Offerman was superintendent. I think he superintended the whole work. If he was competent and faithful, I should say such services were worth $2,500 a year outside of the book-keeping, a book-keeper would be worth $1,000 a year.

Cross-examination.

I am my own superintendent; have sometimes 130 men employed. I have employed sometimes a superintendent or foreman in the shop; never paid over $5 a day.

John Kegan.

I worked about the tunnel from May 1, 1864, to October of the same year. Offerman was superintendent. He gave me my orders. He performed his services well, so far as I know.

E. W. Offerman.

Am son of the plaintiff; 23 years old. I commenced work
29 on the tunnel in May or June, 1864, and worked for 18 months. Father made out the pay roll and fixed my pay at the rate of $1,500 a year. Mr. Gowen refused to pay it; he said, "I can't pay you at the rate of $1,500." I asked him if he did not pay Blundell that. He said, "yes, but you are a boy, and I can't give a boy $1,500 a year. He afterwards said he could not give more than $75 a month. I received that amount till the crib was sunk. Then I

went out to the crib, and received $100 a month. I recollect going into the office in January, 1866. When I entered, father was at work at his desk, and Mr. Gowen was sitting at his desk. Father turned to Gowen and asked him if his service have been satisfactory. Mr. Gowen said "yes, but I don't think I can give you any more pay, because I have been losing money; if I can get an advance from the city, I will give you more."

And thereupon the counsel for the said defendants to maintain and prove the said issue on their part, called the following witnesses who, being duly sworn respectively, testified, as follows that is to say:

James Gowen.

I am one of the defendants. I came from Harrisburg, Penn., to Chicago, in 1863, as a bidder for the Lake tunnel. We com-
30 menced work in November, 1863. The job was completed last month. I was on the work all the time. My whole time was spent about it. I made all the contracts for materials, and had a general supervision of the entire work. The forenoons I usually spent at the shaft, at the shore end of the tunnel. In the afternoon I was engaged about the crib. Frequently I was about the works all night. I never knew the plaintiff until he called on me at the Sherman House in the fall of 1863. He came to me to offer his services as superintendent. He told me he was a practical miner, and he exhibited to me some plans he had draughted for a shaft in a coal mine. He came on to Chicago from Kansas in January, 1864, and commenced work. He looked after things at the shore end of the tunnel in my absence, and kept the time of the men, and the account of expenditures. I employed a young man to keep the books for the first three months, but as there was very little for him to do, it was thought best to discharge him. Mr. Offerman fully approved of this course, and offered to take charge of the books himself. There was but little book-keeping to attend to, and Mr. Offerman had ample time to keep the books without interfering with his other duties; all the directions in regard to the prosecution of the work were given by myself; Offerman merely executed my instructions. When
31 additions or repairs were required for the machinery in use, Mr. Offerman made the plans or sketches which were required, as I had but little knowledge about machinery; he had nothing to do with the construction of the crib, and no supervision of the work done at the lake shaft. I did not rely on him for suggestions or plans when difficulties were encountered in the work. The fan which we procured for purposes of ventilation was first suggested by myself. I had seen in a published report of the Mont Cenis tunnel a notice of such a fan, and I was in favor of procuring one. I never did object to it. Mr. Offerman was a sober and faithful man, and I considered him reliable. It was for this reason I retained him in my employment, and not on account of any peculiar skill or qualifications he exhibited in that kind of work. His offer to take charge of the books was voluntary. He made no objection whatever to keep them, but on the contrary expressed his entire

willingness to keep the accounts. I never did offer or promise to employ his son at $1,500 a year as an inducement for him to keep the books. He never spoke to me about any increase of compensation, and never intimated any expectation or desire that I should pay him more than $2,000 a year. We never had any conversation on that subject to the best of my recollection. He made out the pay rolls monthly, putting down his own pay at $166 67 a month, and I paid him regularly at that rate, and had no idea of ever being called on to pay more. I could have hired a man for less wages than that who could have performed his work as well as he did. The credits which Mr. Offerman made to himself on the account books were never seen by me, until after he left the work. I never examined or looked into the books, while Offerman had charge of them. He kept the books locked up in the office, when he was not using them, and I had no occasion to examine them.

32

Cross-examined.

We made money out of the contract. I have about twenty thousand dollars left as my share of the profits. The books may show more than that, but that sum is all I have left. A year ago last winter we applied to the common council for an additional allowance on the ground that we had been losing money, but it was not true that we had been losing money, we had been making money. The council voted us one hundred and eighty thousand dollars, but the mayor vetoed it.

Direct examination resumed.

I supposed at that time that we were losing money. We had previously offered to throw up the contract, and applied to the board of public works to be relieved from the obligation to complete the work. All the money we made was made out of the extra work; very liberal estimates were made for the extra work, but we did not know, until the work was nearly finished, what allowances the board would make for this work. There was a large amount of extra work, and in some portions of this work we made a profit of from 50 to 80 per cent. Had it not been for this work, we should have lost money.

33

James J. Dull.

I am one of the defendants; reside at Harrisburg, Penn. I was here in Chicago three times a year during the construction of the tunnel. My visits were usually from two weeks to a month in length. I saw Mr. Offerman about the works. He was a steady man, and I regarded him as a competent clerk. He did what he was told to. He kept the books. He would go down into the tunnel sometimes once a day, and sometimes once in two days, occasionally perhaps twice a day; there was a man employed at first to keep the books, but there was really scarcely anything for him to do, and he was dis-

charged. I made no promise to employ Offerman's son at a salary of $1,500 a year in consideration of his taking charges of the books.

I have been a contractor since 1841 on public works; have
34 had occasion to employ superintendents. I could have procured a man as competent as Offerman to perform his duties for $5 a day when I was at Harrisburg. I received a letter from Mr. Gowen about procuring a fair for ventilating the tunnel. I went to Schuylkill Co., Penn., and examined several fans in use there. I afterwards received a letter from Mr. Offerman who was in Philadelphia, and went down there to meet him; he took me to see a fan which he had found there, and I bought it.

George R. Bramhall.

I was employed on the lake tunnel since Jan. 1866. I was employed by the city to inspect the work. Before that I was employed by Dull & Gowen, I lived formerly in Pennsylvania; have been engaged on public works as superintendent; have built bridges and aqueduct; built a cotton factory in Brazil; several mills in this country, and several stores and houses. I built the crib for the lake shaft of this tunnel, and launched it, and sunk the lake shaft; after this shaft was completed I was employed by the city as inspector of the mining work on the tunnel at the lake end; have known Offerman, since

April, 1864; was frequently at the shore shaft, where he was
35 employed. I thought he was in the wrong place. He did not understand his business. I did not consider him expert in any kind of mechanical business. I do not think his services were worth as much as mine. I received $4 50 a day for the first two or three months, and $5 50 after that, and finally $6 00. He did not have as much to do as I did, nor so much responsibility; I was satisfied with what I got. I made the working plans for building the crib, and superintended its construction. The general design was made by Mr. Cheseborough, the city engineer. I got up the machinery for sinking the iron cylinders at the lake shaft; the water there was 33 feet deep. Mr. Offerman on one occasion advised me in a friendly way to draw my pay every month; he said that he drew his pay every month, and there would be no trouble if we drew our pay regularly every month.

Cross-examination.

I worked about three months for $4 50 a day. From July, 1864, to July, 1865, I had $5 50; after that $6 00 a day. I left defendants employment on the 10th or 12th of January, 1866. The crib was launched in August, 1865. I received $6 a day from the city. Dull and Gowen gave me $30 a month in addition while I was employed by the city, for keeping the time of their men, and a journal of the

work. I do not know whether the city authorities were
36 aware of this or not; I did not inform them of it.

Herman Kroeschell.

I am a miner; was born in Germany, and brought up to the business; went to the polytechnic school at Hesse Cassel; I worked a year and a half in a coal mine; came to this country in 1844. Have worked in the lead mines in Illinois; opened some coal mines in Kentucky. For the last three years was employed by the city of Chicago as inspector of mining in the tunnel, from the shore end. I knew Offerman; saw him every day at work in the office and giving directions. I directed all the mining work myself, so far as the tunnel proper was concerned. My compensation, on the average, was $5 a day for woking days; I worked sometimes over regular hours, but had no pay for extra work. My opinion is, that the work confided to me was the most important part of the job. A Mr. Everett had the superintendence of the masonry. Mr. Offerman came down into the tunnel nearly every day to measure the work. He would remain down there from 15 minutes to half an hour; he had nothing to do about directing the mining or masonry.

John Forbes.

I worked on the tunnel as a miner 9 or 10 months; knew the
37 plaintiff; was paid by Offerman. He overpaid me one month $20 by mistake; another man, Chas. Hale, was overpaid $20, and another man $10. I did not correct the mistake, but kept the money; I received $2 25 a day for eight hours' work.

Harry Fox.

Have been a contractor on public works for 20 years; have employed a great many men and superintendents and foremen. A fair compensation for foremen in Chicago, during the last three years, would be about $75 a month. A foreman takes charge of one gang of men; a superintendent has charge of several gangs. Superintendents are worth from $1,200 to $1,500 per annum; we have paid as high as $1,800. We always expect a superintendent to devote his whole time to the business, to keep the accounts of the men and their time, and see that they are kept properly supplied with materials. Superintendents are not paid for extra time when hired by the month or the year; superintendents are not usually expected to keep the books.

O. J. Rose.

Was a member of the board of public works of the city of Chicago four years; we employed superintendents and inspectors on the works
we had charge of. We paid inspectors $75 a month, and had
38 no difficulty in getting men at that price. The general superintendent of streets used to get $1,500 a year; afterwards $1,800, and it was finally raised, not long ago, to $2,400. Mr. Thompson was our superintendent, and was required to devote his whole time to the business, day and night, if it was necessary. I was at the tunnel very often during the progress of the work. Mr. Offerman was engaged at the shore shaft.

Guy H. Cutting.

I furnished the brick for the tunnel; was there often, and saw Offerman; he kept the books and acted as superintendent. I think a man competent for that business was worth from $2,000 to $2,500. When a superintendent is employed by the month he is never allowed for extra time. We pay our book-keeper $1,200 a year, and our superintendent the same. My opinion is, that a man fully as competent as Offerman could have been hired for $2,000 a year.

R. S. Smith.

I am general superintendent for Walker & Cutting, in their brick business, and for the Carbon Hill Mining Co. I commenced at $75 a month, and receive now $125 a month. I keep the time of the men and have general supervision over the business.

39 The foregoing was all the evidence introduced on either side, whereupon the said counsel for the said defendants did then and there insist before the said circuit judge, on the behalf of the said defendants, that the pay-rolls made out from month to month by the said pliaintiff, during the whole course of his employment, upon which his own wages were entered and set down at the rate of $166 67 per month, amounted, under the circumstances detailed in the evidence, to an estoppel in pais against the said plaintiff to claim or recover a larger amount than was therein specified; and the said counsel for said defendant did then and there pray said circuit judge to admit and allow said matter so produced and given iu evidence for said defendants to be conclusive evidence in their favor to entitle them to a verdict in this cause, and to bar the said plaintiff of his action aforesaid.

But to this the said counsel for said plaintiff did then and there object.

And the said circuit judge did then and there declare and deliver his opinion to the jury aforesaid, that the said matter, so produced and given in evidence, was not sufficient to bar the said plaintiff of his action aforesaid, but that the said jury should consider that in connection with the other facts introduced in evidence, and render such verdict as should seem to them warranted under all the
40 circumstances appearing in the case, whereupon said counsel for said defendants did then and there, on behalf of the said defendants, except to the aforesaid opinion of the said circuit judge, and insisted on the said matter above specified as an absolute bar to the said action. And the said circuit judge, under the charge, and with the direction aforesaid, left the aforesaid issue, and the evidence so given on the trial thereof, as aforesaid, to the said jury; and the said jury aforesaid then and there gave their verdict for the said plaintiff, and dollars damages. And inasmuch as the said several matters, so produced and given in evidence, and the said matters so objected and insisted on by the counsel of the s'd defendants as a bar to the action af's'd, do not appear by the

record of the verdict aforesaid, said counsel for said defendants did then and there propose their exception to the opinion of said circuit judge, and requested him to put his seal to this bill of exceptions.

And thereupon the said circuit judge doth put his seal to this bill of exceptions.

[SEAL.] THOMAS DRUMMOND.

Endorsed: Filed April 20th, 1867. Wm. H. Bradley, cl'k.

41 On this day, to wit, the 29th day of April, A. D. 1867, came said defendants, and filed their appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

Circuit Court of the United States for the 7th circuit and northern district of Illinois.

JOHN P. OFFERMAN
vs.
JAMES J. DULL AND JAMES GOWEN.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents, that we, James J. Dull and James Gowen, of the county of and State of , and Charles L. Woodman and Joseph M. Dake, of the county of Cook and State of Illinois, are held and firmly bound unto John P. Offerman, of the county of and State of , in the penal sum of six thousand dollars, lawful money of the United States, for the
42 payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this twenty-second day of April, A. D. 1867.

The condition of the above obligation is such, that whereas the above-named James J. Dull and James Gowen have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the Circuit Court of the United States for the 7th circuit and northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named James J. Dull and James Gowan shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void, otherwise the same shall be and remain in full force and notice.

[SEAL.] J. S. DULL.
[SEAL.] JAMES GOWEN.
[SEAL.] JOS. M. DAKE.
[SEAL.] C. L. WOODMAN.

Approved:
THOMAS DRUMMOND.

Endorsed: Filed April 28, 1865. Wm. H. Bradley, cl'k.

43 CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois, ss:

The United States of America to the judges of the Circuit Court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of judgment in a plea, which is in the said court before you, between John P. Offerman, plaintiff, and James J. Dull and James Gowan, defendants, a manifest error hath happened to the damage of the said James J. Dull and James Gowan, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first
44 Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

WM. H. BRADLEY, *Clerk.*

45 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the Circuit Court of the United States for said northern district of Illinois, do hereby certify the foregoing transcript, from pages one to forty-two, inclusive, to contain a full, true, and perfect copy from the record of all the proceedings of said court in said cause, wherein John P. Offerman was plaintiff and James J. Dull and James Gowan, defendants, as the original of the same now remains in my custody; and I further certify, that the writ of error sued out by said Dull and Gowan, plaintiffs in error in said cause, is annexed to said transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said northern district, this twenty-ninth day of November, A. D. 1867.

[SEAL..] WM. H. BRADLEY, *Clerk.*

[5-ct stamp.]